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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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IN THE MATTER OF	)	
	)	
LIMITATIONS ON COMMERCIAL TIME ON TELEVISION BROADCAST STATIONS	)	**MM Docket No. 93-254**
	)	

COMMENTS OF DIRECT MARKETING ASSOCIATION

In this proceeding, the Commission, on its own motion, has undertaken to reexamine the question whether the "public interest" warrants the reestablishment of some limits on the amount of commercial matter that a television station can broadcast. Notice of Inquiry in MM Docket 93-254 at 2 (released Oct. 7, 1993). The Direct Marketing Association ("DMA") respectfully maintains that no public policy justification exists for the reimposition of commercial limitations on television stations and that the attempt to reimpose such rules would enmesh the Commission, television licensees and their advertisers, including direct marketers, in intractable constitutional and administrative issues.

STATEMENT OF INTEREST

1. The DMA is the principal trade organization representing business enterprises and nonprofit institutions engaged in direct marketing practices for the promotion and sale of goods and services and the solicitation of funds to support charitable and similar undertakings. The term "direct

marketing" does not define an industry. It describes methods or techniques for advertising (and servicing) a broad range of consumer and industrial products and services. Television has long been and continues to be an important medium of direct marketing, in formats that include direct response advertising, home shopping, and, more recently, infomercials.

2. In all of the various forms of direct marketing, including television, the DMA is extremely sensitive to consumer welfare. Our more than 3,500 members include some of the best and most respected corporate names in America, in industries as diverse as catalog and magazine publishers, and in book and record publishing, manufacturers and marketers of hardware, tools, appliances and electronics, banks and other financial institutions, telecommunications and information service providers, retail stores, automobile manufacturers, and distributors of specialty foods. All of these companies recognize that the success of their direct marketing efforts depend heavily upon consumer understanding and acceptance of direct marketing practices. As a result, the DMA maintains an extensive self-regulatory program which include guidelines for direct response advertising. The DMA has long worked closely in cooperation with consumer organizations as well as federal and state regulatory agencies to address such consumer concerns as they arise in the context of direct marketing practices.

3. Consumer welfare is certainly an important part of the public interest standard under the Communications Act.

As Commissioner Quello has noted, the public interest standard looks to the present and future, not to the past, for its meaning. It is DMA's conviction that the Commission's 1984 Order eliminating the Commission's "guidelines" which limited the amount of commercial matter a television station might carry during a broadcast hour was responsive to consumer welfare. It remains so.

DISCUSSION

A. There is No Public Policy Basis or Need to Reimpose Limits on Commercial Time.

4. The issue the Commission has raised should be considered in context. In the first instance, the Television Deregulation Order[1/] did not strip away the protections that American consumers are accorded in their dealing with those who advertise on television. The Television Deregulation Order did not, in any respect, dilute the powers of the Federal Trade Commission to deal with false and deceptive advertising practices. On the contrary, in ways which importantly affect the quality of television advertising, consumer safeguards have been strengthened in the past decade. For example, television direct response advertising typically involves order-taking by means of an 800 or other toll-free number; very recently, the Federal Trade Commission has extended its Mail Order

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1/ Report and Order in MM Docket 83-670, 98 FCC 2d 1076 (1984), recon. denied, 104 F.2d 357 (1986), aff'd in part and remanded in part, sub. nom., Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987) (the "Television Deregulation Order").

Merchandise Rule to include orders received by the marketer via the telephone. See Mail and Telephone Order Rule, 58 Fed. Reg. 49896 (Sept. 21, 1993). The DMA strongly supported this aspect of the Federal Trade Commission's mail order merchandise initiative. The expansion of the rule to encompass orders received by telephone provides assurance to consumers who respond to a direct response television ad with assurance that the product they have offered will be shipped in a timely fashion.

5. Similarly, pay-per-call services have, in recent times, been promoted in and associated with longer forms of commercial advertisements on television. The Federal Trade Commission's regulations implementing the Telephone Disclosure and Dispute Resolution Act of 1992 not only govern the 900 service programs themselves, but guard against consumer confusion and dissatisfaction by setting standards governing the format and disclosures that are required with television as well as other forms of advertising of these services. See 16 C.F.R. 308.1 et seq. These rules are reinforced by the FCC's own regulations prescribing dispute resolution mechanisms that must be complied with by telephone companies. See 47 C.F.R. 64.1501, et seq.

6. In short, the action which the Commission took in 1984 was extremely modest in scope. It did not expose the American public to unscrupulous advertising practices. It did not relieve television broadcast stations, regardless of type,

of the obligation to provide programming responsive to the needs and interests of the communities they serve. See, Television Deregulation Order, supra. Rather, that order narrowly focused upon and removed only certain inherently arbitrary (cf. U.S. v. National Association of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982)) numerical limitations on the amount of "commercial" programming that a television station may carry.

7. Additionally, the video marketplace has changed significantly in the decade since the Television Deregulation Order. In 1984, cable television was in its infancy and other forms of multichannel video program distribution systems, such as SMATV, MMDS, DBS were barely on the drawing boards. In the past decade, cable television has come to maturity. It, and its competitors, including soon to be launched direct broadcast satellite services, provide the American public with more news and public affairs and entertainment programming than ever before. Television itself has grown with the result that there are more television stations on the air now than at any time in our history. This trend toward diversity in the video marketplace will surely continue into the forseeable future as new technologies--ATV and interactive TV--come on line. The robust competitive market for video advertising together with self-regulation activities of those who use the electronic video media for the marketing of goods and services negates any need for governmental intrusion in this area.

8. In light of these considerations, the DMA believes that the question the Commission has propounded in its Notice of Inquiry must be reframed. The question is not "whether and in what specific manner an excess of commercial programming disserves the public." Notice at ¶ 7. Rather, the question is whether and in what specific manner the public interest would be served by limiting the access of manufacturers and suppliers of goods and services, including direct marketers, to over-the-air television as a means of informing the public about their products and services. The DMA believes the answer to this question is plain: there is no public interest justification for restricting the use of over-the-air television stations as a medium of promoting the sale of products and services that are themselves beneficial to the American public, through advertisements which are truthful and are in accord with recognized self-regulation standards and law.

9. Any argument in favor of limiting the amount of commercials in any medium (whether the various forms of television that now exist, radio or print) necessarily proceeds from the premise (often unstated) that exposure to "too much" advertising is harmful to consumers. As the DMA has pointed out in other contexts, "some percentage of the American public simply does not care for any form of advertising, regardless of

the medium."[2/] But, the very success of television as an advertising and direct marketing medium establishes that those who are concerned about so-called "excessive commercialism" are in the distinct minority and that the majority of the American public finds television advertising in all of its forms informative and useful. As a result, there is no principled basis for concluding that advertising in excess of some quota should be subjected to governmental censorship. In 1984, the Commission correctly concluded that the marketplace provides a self-clearing mechanism for the determination of not only how much but what type of advertising the American public will accept on television. Television Deregulation Order at 1101-05. That conclusion remains valid today and for the forseeable future.[3/]

10. If a video programming outlet carries a level of commercial content that is unacceptable to viewers, viewers will avoid that outlet and turn to others that have less

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2/ See Comments of Direct Marketing Association in CC Docket No. 92-90 at 6 (filed May 26, 1992).

3/ We recognize that, in obedience to legislative mandate, the Commission has reimposed numerical limitations on the amount of commercial advertising that may be aired in conjunction with programming designed to be primarily of interest to children. However, as the Commission, the Congress and the courts have long recognized, children's television represents a "special realm," from which broader or more general conclusions cannot be drawn, Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987).

commercial content.[4/] This shift in viewing will drive down the profitability (because of decreased attractiveness to advertisers) of the "overly commercial" outlet and, contemporaneously, enhance the profitability of the outlets to which viewers have shifted. This mechanism for assuring that whatever public interest there is in limiting commercial content will be accomplished without governmental intrusion.

11. In any case, the measure of whether there is "too much" commercial content must be a relative one. It is the overall proportion of commercial to non-commercial video programming that must mark the measure of a proper (or improper) quantum of commercial content. Even if there has been some increase in commercial programming, it is equally plain that there has been a substantial increase in the total amount of other-than-commercial programming that is available to the American public as the result of the increase in the number of over-the-air television stations on air, the development of new television networks, and the proliferation of alternative video distribution systems. The increased amount of video programming generally available precludes any basis for a finding that--even if a standard of reference could be devised--there is "too much" commercialism on television.

[4/] The proliferation of video outlets available today--and to be available in the near future--makes an important contribution to this argument. Obviously, a video monopolist would face a much less vigorous market clearing mechanism, just as economic monopolists do.

12. In context, it is thus clear, we submit, that there is no public policy basis or need for consideration of the reimposition of commercial limits on over-the-air television stations.

B. The Attempt to Limit Commercials on Television Would Create Insuperable Practical and Constitutional Problems.

13. In the Notice of Inquiry, the Commission requests comment on how such limitations, if they were to be adopted, should be implemented. Notice at ¶ 8. DMA believes that the practical, as well as constitutional issues, that would arise should the Commission attempt the imposition of commercial limitations serves only to reinforce the conclusion that this inquiry should be closed without further action.

14. The history of the "guidelines" that existed prior to 1984 serve to establish the serious administrative difficulties associated with the content-based regulations. First, there is the problem of defining "commercial" as opposed to non-commercial speech. See, e.g., KISD, Inc., 22 F.C.C. 2d 833 (1970). Second, there is the problem of how to apply any "quota" on commercial time. The Notice recognizes that the old policy, based upon a specified number of minutes per broadcast hour, is irrational: among other things, it would have the effect of precluding longer form commercials. See Notice of Inquiry at ¶ 8. Extending the measurement period to a year or license period would not serve consumer welfare because the cost of advertising is reflected in the cost of products or

services. Third, quotas or numerical limitations of whatever character would require the reimposition of costly, cumbersome and administratively difficult logging and reporting rules. In sum, any system based upon quotas of commercial matter, whether expressed as a substantive standard or an "informal processing guideline" (as suggested in the Notice) is administratively unworkable and threatens consequences to television stations, advertisers and above all consumers that the Commission surely does not intend.

15. Last, but by no means least, the attempt to establish any form of restriction on the amount of commercial programming that television stations carry would raise fatal constitutional concerns. As the Commission acknowledged in the Notice of Inquiry, the Supreme Court has admonished regulators not to "place too much importance on the distinction between commercial and non-commercial speech." City of Cincinnati v. Discovery Network, 113 S.Ct. 1505 (1993). At the minimum, limitations on commercial speech must be "narrowly tailored" to the regulatory objective or policy goal that underlies the rule. Board of Trustees v. Fox, 492 U.S. 469 (1989). The governmental goal that underlies this inquiry is not that there be limitations on the amount or duration of commercial matter on television per se. It is, or at least should be, that over-the-air television stations appropriately demonstrate that they serve the public interest as the Communications Act

demands. TV Deregulation Order, supra.[5/] To the extent that a particular station's commercial policies and practices have or are likely to interfere with service that is responsive to the needs and interests of the community the station serves, that is a factor the Commission can consider under its existing licensing and renewal standards. By contrast, the attempt to establish separate quotas for commercial programming, or to otherwise focus upon the amount (or duration) of commercial programming as a separate element of the public interest determination, cannot be reconciled with the cautions noted in The Discovery Network and would go further than is necessary to achieve legitimate public policy goals in contravention of Fox.

CONCLUSION

For these reasons, the proceeding initiated by this Notice should be closed without further agency action.

Respectfully submitted,

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December 20, 1993

5/ Notably, the Commission has long abandoned its policies requiring television stations to show that they have aired an "appropriate amount" of non-commercial programs (particularly news, public affairs, and all other (exclusive of entertainment and sports)). In constitutional terms, the same considerations apply here.

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